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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

E.K. WADE,

Plaintiff,

v.

ELAINE CHAO, SECRETARY OF  
LABOR, ET AL.

Defendant.

No. C 08-00021 CRB

**EX PARTE MOTION PURSUANT TO  
FED. R. CIV. P. 56(f)**

**I. INTRODUCTION**

On January 3, 2008, Plaintiff E.K. Wade ("Plaintiff") served the United States Attorney's Office with a Complaint in the above captioned matter. The Complaint is over one-hundred pages long and involves eleven individual federal Defendants and the Secretary of Labor (collectively, "Defendants"). Even though Defendants' responsive pleading is not due until March 3, 2008, on February 4, 2008, Plaintiff filed a Motion for Summary Judgment ("Plaintiff's Motion").<sup>1</sup>

Further complicating matters, on January 2, 2008, Plaintiff filed and served the United States Attorney's Office with a complaint in Case No. C 08-00001 MJJ. Both that complaint and

<sup>1</sup>Defendants enter their appearance here for the sole reason of opposing Plaintiff's Motion and reserve the right to raise all appropriate defenses to the Complaint in their responsive pleading.

1 the complaint in the above-referenced action involve the same parties, the same facts, and the  
 2 same circumstances. Accordingly, on February 4, 2008, the Defendants moved to consolidate  
 3 the cases and requested that the Plaintiff be ordered to file one Complaint.<sup>2</sup> The Defendants are  
 4 awaiting a response to their request.<sup>3</sup>

5 In light of the procedural posture of this action, Plaintiff's Motion is premature.  
 6 Therefore, the Defendants hereby oppose Plaintiff's Motion, and move the Court to refuse the  
 7 Motion pursuant to Fed. R. Civ. P. 56(f). This motion is supported by the attached Declaration  
 8 of Melissa Brown.

## 9 II. ANALYSIS

10 Plaintiff's Motion should be refused because it is premature. Courts have been clear:  
 11 "The purpose of Rule 56(f) is to prevent the opposing party from being railroad by a premature  
 12 motion for summary judgment." Herring v. Countrywide Home Loans, Inc., 2007 WL 707073,  
 13 at \*2 (D. Ariz. Mar. 6, 2007) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1985)). "When  
 14 a motion for summary judgment is filed so early in the litigation, before a party has had any  
 15 realistic opportunity to pursue discovery relating to its theory of the case, district courts should  
 16 grant any Rule 56(f) motion fairly freely." Burlington Northern Santa Fe R.R. Co. v. Assinibione  
 17 & Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773 (9th Cir. 2003) (emphasis  
 18 added).

19 Here, Plaintiff has filed his motion before the Defendants have had sufficient opportunity  
 20 to investigate the claims raised in his Complaint. Indeed, Defendants' opposition to Plaintiff's  
 21 Motion is due nearly two weeks before their Answer must be filed. Defendants lack sufficient  
 22 time to gather supporting affidavits and information to support their opposition to Plaintiff's  
 23 Motion. Accordingly, Defendants move the Court to refuse Plaintiff's Motion pursuant to Fed.

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24 <sup>2</sup>By way of background, on December 28, 2007, the Honorable Martin J. Jenkins issued  
 25 an order dismissing Plaintiff's action and ordering Plaintiff to file one new complaint.  
 26 Surprisingly, Plaintiff filed two complaints.

27 <sup>3</sup> It should also be noted that Plaintiff's Motion was not received by the United States  
 28 Attorney's Office until February 7, 2008, at which time the United States Attorney's Office also  
 received Plaintiff's "Amended Memorandum of Points And Authorities In Support of Motion for  
 Summary Judgment."

1 R. Civ. P. 56(f). Alternatively, Defendants request the Court to continue the Motion hearing to  
2 June 3, 2008, to provide Defendants opportunity to investigate Plaintiff's claims.

3 **III. CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request the Court to deny Plaintiff's  
5 Motion, or continue the hearing date.

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7  
8 Respectfully submitted,

9 JOSEPH P. RUSSONIELLO  
10 United States Attorney

11 s/Melissa Brown

12 Dated: February 8, 2008

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MELISSA K. BROWN  
14 Assistant United States Attorney  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

**EX PARTE MOTION PURSUANT TO FED. R. CIV. P. 56(f)**

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

☒ **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **PERSONAL SERVICE (BY MESSENGER)**

☐ **FEDERAL EXPRESS**

☐ **FACSIMILE (FAX)** Telephone No.: See Below

to the party(ies) addressed as follows:

E.K. Wade 542 North Civic Drive, Apt. D Walnut Creek, CA 94597		
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 8, 2008 at San Francisco, California.

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/s/  
CAROL E. WEXELBAUM  
Legal Assistant